LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAY 7 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1497

IN THE MATTER OF THE PETITIONS OF UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S FOR EXONERATION FROM OR LIMITATION OF LIABILITY

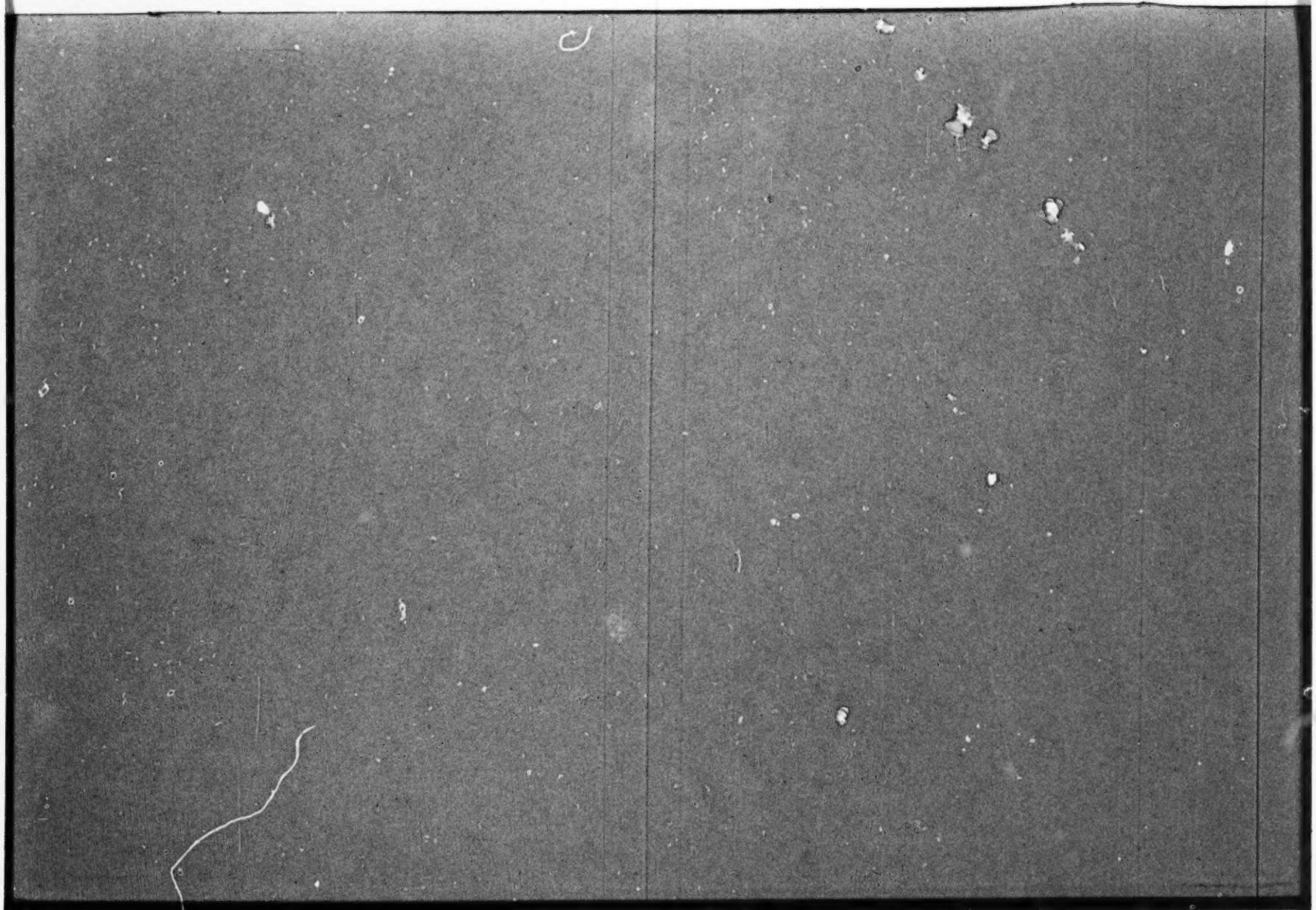
JEAN E. COOK, Administratrix of the Estate of Charles H. Cook, Deceased,
Petitioner,
v.
UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S, ET AL.,
Respondents.

REPLY BRIEF OF PETITIONER JEAN E. COOK

ELMER L. RADKA
251 W. Erie Avenue
Rogers City, Michigan 49779

GOODMAN, EDEN, ROBB, MILLENDER, GOODMAN & BEDROSIAN
By: DEAN A. ROBB
CHARLES J. BARR
3200 Cadillac Tower
Detroit, Michigan 48226
313-965-0050
Attorneys for Jean E. Cook, Petitioner

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8715—WO. 2-8732



IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

IN THE MATTER OF THE PETITIONS OF UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S FOR EXONERATION FROM OR LIMITATION OF LIABILITY

JEAN E. COOK, Administratrix of the Estate of Charles H. Cook, Deceased,
Petitioner,
v.
UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S, ET AL.,
Respondents.

REPLY BRIEF OF PETITIONER JEAN E. COOK

This Reply Brief is limited to Issue No. 2 of the Petition for a Writ of Certiorari relating to the effect of inflation on future damages.

Respondents were correct on page 4 of their Brief in stating that other cases in the federal system have dealt with the issue of the effect of future inflation on awards for future losses. However, very few cases have dealt with the precise issue of whether, in a *federally* created cause

of action, such as the present case, a trier of fact may take into account the effect of future inflation in determining damages for future losses.

The case cited by Respondents at page 4 of their brief is illustrative of the way the inflation issue has been approached. The court, in *McWeeney v. New York, N.H. & H R.R. Co.*, 282 F.2d 34 (2d Cir. 1960), an F.E.L.A. case, was presented with the question whether to deduct anticipated income taxes in calculating the injured employee's loss of future earnings. In deciding this question in the negative, the court expressly considered the effect of future inflation as an offsetting factor in reducing any alleged excessiveness in the award. The court went on to say:

> Though some courts have sanctioned instructions permitting the jury to take into account inflation between the injury and the trial, there is little or no authority in favor of charging the jury to take future inflation into account. . . . Yet there are few who do not regard some degree of continuing inflation as here to stay and would be willing to translate their own earning power into a fixed annuity, and it is scarcely to be expected that the average personal injury plaintiff will have the acumen to find investments that the are proof against both inflation and depression—a task formidable for the most expert investor. The effect of inflation of 1% a year over McWeeney's 29-year expectancy at trial would go a long way toward offsetting any excess in the verdict due to failure to deduct income tax. At 38.

McWeeney obviously does not reach the same conclusion as the Court of Appeals below, as Respondents assert, but rather recognizes inflation as an unavoidable, pernicious threat to any plaintiff's award and as something that should, and in any event is likely to be taken into consideration in fixing the amount of damages.

In *Jones v. Atlantic Refining Co.*, 55 F. Supp. 17, 22 (E.D. Penn. 1944), the court, in a Jones Act case, expressly held that the lessened purchasing power of money as a result of inflation must be considered in evaluating an injured seaman's future losses. See also *Foster v. Donora Southern R.R. Co.*, 144 F. Supp. 297 (W.D. Penn. 1956), aff'd 241 F.2d 714 (3d Cir. 1957) (F.E.L.A. case); and *Hord v. National Homeopathic Hosp.*, 102 F. Supp. 792 (D.C. 1952), *aff'd* 204 F.2d 397 (D.C. App. 1953) (negligence case).

In addition, it should be noted that the position of the Sixth Circuit Court of Appeals on this very issue has recently been called into question in *Wilmore v. Hertz Corp.*, 437 F.2d 357 (6th Cir. 1971).

The Court (speaking through a 3-judge panel) stated that the discussion in *Sleeman v. Chesapeake & Ohio Ry. Co.*, 414 F.2d 305 (6th Cir. 1969), relating to the effects of future inflation on future damages, upon which the Court below relied (speaking through a different 3-judge panel) was merely *dictum*. Hence, this most recent pronouncement of the Sixth Circuit Court of Appeals leaves open the question whether its decision on this issue might not be different when it is presented to it again.

Finally, petitioner urges this Court to consider the vast number of state court decisions dealing with federally created causes of action, such has F.E.L.A., which have made allowances for the effects of future inflation upon awards for future losses. These cases are collected in the Annotation at 12 ALR 2d 611 under the heading, "Changes in Cost of Living or in Purchasing Power of Money as Affecting Damages for Personal Injuries or Death."

Petitioner contends that the effect of future inflation upon an award for future losses is a very substantial issue

which merits the attention of this Court. It arises in every case dealing with future losses in a federally created cause of action, whether tried in a state or federal court. As Judge Sobeloff said in *Virginian Ry. Co. v. Rose,* 267 F.2d 312 (4th Cir. 1959):

> Common experience attests that the value of the dollar has been subject to consistent depreciation. . . . [Fn.4] . . . Courts, federal and state, throughout the land have taken judicial notice of the diminished purchasing power of money and have held that this is a factor to be considered in making and in reviewing awards of damages. (Cases cited.) At 316.

Considering the frequency with which this issue arises, both in state and federal courts, and the fact that no definitive resolution is possible other than by consideration of this Court, Petitioner respectfully urges that her petition for Certiorari be granted so this serious question of federal law may be resolved.

Respectfully submitted,

ELMER L. RADKA
251 West Erie Avenue
Rogers City, Michigan 49779

GOODMAN, EDEN, ROBB, MILLENDER,
GOODMAN & BEDROSIAN
By: Dean A. Robb
Charles J. Barr
3200 Cadillac Tower
Detroit, Michigan 48226
965-0050
Attorneys for Petitioner, Jean E. Cook

Dated: May 5, 1971